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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 423.

ARTHUR McALEENAN, HENRY J. McALEENAN, H. ALVIN McALEENAN, ALVINA V. McALEENAN, KATHERINE McALEENAN FAGAN, MARGERY McALEENAN O'SULLIVAN, KENNETH K. McALEENAN and THERESA R. HAGGERTY, Co-partners, Doing Business Under the Firm Name and Style of "McAleenans," *Petitioners,*

v.

GEORGE D. HORNING, Incorporated, a Corporation, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This action was instituted by petitioners against respondent to recover $17,000.00 loaned by petitioners on July 8, 1941. In their amended complaint, petitioners stated their cause of action in nine different forms. At the completion of all of the evidence petitioners had withdrawn five causes of action and relied on the remaining four. As stated by the District Judge—

> "These remaining causes of action, on which the case was submitted to the jury, each stated in somewhat

varying form a contractual relationship between the plaintiffs and the defendant and the court gave what it considered pertinent instructions on each. One of these was upon the theory that Mrs. Boyle in negotiating the loan from plaintiffs was acting as agent of the defendant; another was based on the theory that Mrs. Boyle and the defendant borrowed the money jointly; and the third upon the proposition that the loan had been made for the benefit of the defendant with the understanding by both parties that defendant was obligated for its repayment." (R. pp. 7, 8)

All charges of fraud and deceit were withdrawn.

As pointed out by the opinion of the Circuit Court of Appeals, the loan was made to Mrs. Boyle and there was no evidence of any contractual relation between petitioners and respondent. The court also stated that the clear and uncontradicted testimony of McAleenan, the petitioner who made the loan for his pawnbroking establishment, is patently inconsistent with any such theory. To quote:

"* * * No other tenable conclusion, we think, can be reached than that McAleenan well understood that the loan was being made to Mrs. Boyle and neither to defendant singly nor defendant jointly with Mrs. Boyle. In his testimony relating to his telephone conversation with Horning, he stated: 'I thanked him for his courtesy in *sending the business* and hung up.' (Italics ours) Further, he (fol. 127) testified: 'Mr. Hoffman said that Mrs. Boyle (not defendant) might like to retrieve the articles individually and if I would break it down for her.'

Nor do we view it as unimportant that when Kelly, plaintiffs' employee, asked if the pawn ticket should be made out in the name of Horning, McAleenan replied: 'No. Make it out in the name of Mrs. Boyle.' In this connection it may be noted that it was Mrs. Boyle (not Hoffman for defendant) who signed the stub, thereby agreeing to be bound by all the conditions thereon.

Much stress is placed by plaintiffs on the letter of introduction presented to McAleenan by Hoffman, as supporting the theory that the loan was being made to

defendant or to defendant and Mrs. Boyle jointly. While we agree that this letter might well be termed a classical example of ineptness, we think the following testimony of McAleenan clearly shows that there was no misunderstanding on his part.

Q. Did not the letter itself say: 'He is authorized to place in pawn for one of our customers?' You knew from that letter that it was Mrs. Boyle who was seeking a loan, did you?

A. Surely.

Q. And not Horning?

A. I imagine that was self-evident.

Q. And you so understood it at the time?

A. That is right." (R. pp. 122, 123)

It is patent that the District Court should not have submitted the case to the jury on the causes of action retained by petitioners. Appeal was prosecuted to the Circuit Court of Appeals because the District Court refused to grant respondent's motion and enter a judgment for respondent notwithstanding the verdict.

No sound reason is assigned in the petition to support the request of petitioners that this court exercise its judicial discretion in favor of granting the writ. An alleged constitutional question is suggested and inapplicable cases cited but not reviewed. (P. 55 et seq.) Most of the petition consists of an argument on the merits of petitioners' contentions in the courts below as though the petition had been granted and the case here for reargument. It is interlarded with exaggerations and catch phrases of counsel designed to lead the court to believe that the respondent had been guilty of some fraudulent act, although petitioners did not have sufficient confidence in this suggestion, as already indicated, to stand on their causes of action in fraud and deceit and frame issues upon the same to be submitted to the jury.

RIGHT TO THE WRIT OF CERTIORARI.

The only reasons advanced in the petition for granting the writ are, (1), petitioners were denied the right to have the judgment of a jury on the questions of fact presented at the trial; (2), the appellate court invaded the province of the jury; and (3), it did not have authority to reverse the judgment below and remand the case with direction that the final judgment be entered for the respondent. (Pet. 5)

The "Reasons for Granting Writ" and "Questions Presented", (p. 5) on their face disclose that petitioners are not entitled to the review sought within the meaning of Section 240(a) of the Judicial Code, as amended, (28 U.S.C.A., sec. 347(a)), as interpreted by the decisions of this court, and its Rule 38(2)(5).

The first two reasons challenge the right of an appellate court to review the record and determine whether or not there is sufficient evidence to warrant the submission of a case to the jury. This proposition is so untenable that it is not worthy of reply. The third reason challenges the right of the court in reversing this case, to remand with direction to enter a judgment for the respondent. There is no merit in this contention.

At the close of petitioners' case respondent moved for a directed verdict. At the close of all of the evidence the motion was renewed. The court submitted the case to the jury after taking these motions under consideration and reserving action thereon. (R. p. 19) The jury returned a verdict in favor of petitioners. Respondent then moved the court, within the time prescribed, to enter a judgment in accordance with its motion, or in the alternative that judgment for plaintiff be set aside and a new trial granted. This motion was denied.

The entire procedure was strictly in accordance with the provisions of Federal Civil Procedure Rule 50(b).

The Circuit Court of Appeals in disposing of some of the contentions made in the petition stated its legal duty

to remand with direction to enter judgment for respondent in the following quote:

> "We are not impressed with the contention of plaintiffs' counsel that the jury's verdict should be sustained because it was a general one, since we find no sufficient evidence to support any of the causes of action upon which plaintiffs rely. Nor do we find merit here in the argument that since the verdict was approved by the trial judge it should not be disturbed on appeal. It is clear that should it be found on appeal that the evidence was insufficient, the appellate court may reverse with a direction to enter judgment notwithstanding the verdict. Baltimore & Carolina Line v. Redman, 295 U. S. 654; Carpenter v. Durell, 90 F. (2d) 57." (R. p. 122)

The application for the writ is answered by the case of *Brunet* v. *S. S. Kresge Co.*, 115 F. (2d) 713, C. C. A. 7th Cir., decided November 1, 1940. In that case a judgment was rendered against the defendant for $5,000.00 in an action for damages for injuries claimed to have been sustained by the plaintiff. Defendant moved for a directed verdict at the close of the plaintiff's evidence, and again at the close of all of the evidence, which motions were overruled. The Circuit Court held, after a careful reading of the record, it was convinced that the record did not disclose negligence on the part of the defendant and freedom from negligence on the part of the plaintiff so as to justify the judgment in favor of the plaintiff, and that defendant's motion for a directed verdict should have been sustained. After reviewing the law, the court directed that the judgment be reversed and the cause remanded with direction to dismiss on the merits. On motion for a rehearing plaintiff raised the constitutional question now made by petitioners, namely, that she was denied the right of trial by jury guaranteed by the Seventh Amendment, and cited *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879, and *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 57 S. Ct. 809, 81 L. ed. 1177. The court reviewed the Slocum

case and the later decision of this court in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. ed. 1636, and then stated:

> "Here, motion was duly made for the directed verdict, which was taken under advisement and later denied. Without the new Rule, this would undoubtedly bring the case within the purview of the Slocum case, and we would be required to remand for new trial. However, within ten days after reception of the verdict, appellant filed two motions, one to set aside the verdict and for new trial, and the other to set aside the verdict and enter judgment notwithstanding the verdict. Both were duly denied, and judgment entered on the verdict. We think this action of the defendant preserved its rights under the Rule, so that it is now entitled to direction of a judgment without new trial. When the Supreme Court decided the Redman case, it ordered that the judgment of the Court of Appeals be modified by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial. It had previously stated that this judgment of dismissal would be the equivalent of a judgment for the defendant on a verdict directed in its favor. It appears that the Rule seeks to extend and crystallize the practice prescribed in the Redman case, hence our directions for dismissal on the merits." (p. 716)

We cite and quote from that case because certiorari was denied by this court, (61 S. Ct. 1102, 313 U. S. 577, 85 L. ed. 1535).

See also—

Waggaman v. *General Finance Co.*, 116 F. (2d) 254, C. C. A. 3rd Cir.

Williams v. *New Jersey-New York Trans. Co.*, 113 F. (2d) 649, C. C. A. 2nd Cir.

Petitioners seek to inject a constitutional question into this case which does not exist in an effort to induce this court to review the judgment of the Circuit Court of Appeals on a ruling which is not one of general importance or

public interest nor of an exceptional or extraordinary character.

In *Del Vecchio* v. *Bowers*, 296 U. S. 280, 80 L. ed. 229, 232, certiorari was granted in a case decided by the Court of Appeals of the District of Columbia because it involved the Longshoremen's and Harbor Workers' Compensation Act, which was national in scope. In stating the reasons for granting the writ in that case, this court clearly excluded from the operation of Rule 38 cases of this kind in the following language:

> "In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement *constitutes a precedent of general application.* We therefore granted the writ because of the important question as to the effect of Sec. 20(d)." (Italics supplied)

In *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 82 L. ed. 1273, this court refused to grant a writ of certiorari merely to review the evidence or inferences to be drawn from it. That is precisely what petitioners pray in this case.

In the course of its opinion, the court said:

> "There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508, 69 L. ed. 413, 44 S. Ct. 164; United States v. Johnston,

268 U. S. 220, 227, 69 L. ed. 925, 926, 45 S. Ct. 496." (p. 1275)

Rule 38 was in effect at that time.

Petitioners rely upon *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 88 L. ed. 322. That case involved legislation national in scope, namely, the Federal Employers' Liability Act, and, as stated by the court, certiorari was granted "because of important problems as to petitioner's right to a jury determination of the issue of causation." (p. 30)

We do not attempt to reply to the lengthy brief and argument of petitioners because, as stated in *General Talking Pictures* v. *Western Elec. Co., supra*, granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.

Petitioners seek to prejudice the legal position of respondent by arguing at much length (p. 34 et seq.) that respondent may have received $8,000.00 out of the transactions of Mrs. Boyle over and above the amounts owing to it by Mrs. Boyle when a settlement was made. This same argument was made in the Circuit Court of Appeals. After petitioners at their solicitation were permitted to file a supplemental brief, respondent filed a reply brief referring to respondent's pledge book which was produced in court and offered in evidence by *petitioners*, and was thereafter filed in the clerk's office of the Circuit Court of Appeals, which showed that when a settlement was made with Mrs. Boyle upon her return from New York, she redeemed loans made to her by respondent which, together with interest, amounted to $43,236.10. Adding to that figure the amount received by Mrs. Boyle in cash, namely, $10,200.00, and a payment of a loan made by her daughter of $100.00, it was shown that approximately $53,536.10 was accounted for. The remaining $463.90 was used for expenses of Mrs. Boyle and Hoffman in connection with the trips to New York, insurance and other charges.

There was submitted to the Circuit Court of Appeals photostats of the pages of the pledge book showing an itemization of these loans, their numbers, the dates they were made and that all of them were redeemed on July 11, 1941, by Mrs. Boyle when the settlement was made. The entire argument of petitioners is a tenuous one not based on the actual facts demonstrably shown by the records and solely on one or two loose statements injected by counsel for petitioners in question propounded to the witnesses. We believe it is not necessary in this opposition to further analyze the record on this point.

CONCLUSION.

It is respectfully submitted that the alleged error of the Circuit Court of Appeals, 4th Circuit, is not such as to call for review and determination by this Honorable Court.

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